IN THE

Supreme Court of the United States

NUMBER_____

BRUNO A. KOEHLER AND HUGO W. ACKERMANN,
PETITIONERS

versus

THE UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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TO THE

SUPREME COURT OF THE UNITED STATES:

Bruno A. Koehler and Hugo W. Ackermann, Petitioners, here pray that a Writ of Certiorari be issued to review the judgement entered in this cause on May 25, 1951, on which Petitioners' Motion for Rehearing was denied on June 25, 1951, by the United States Court of Appeals for the Fifth Circuit.

OPINION

The District Court did not write an opinion.

A copy of the opinion of the Court of Appeals, including the dissenting opinion, it attached hereto, which opinions have not to this date been published in the Federal Reporter.

JURISDICTION

This Court is under no statutory or constitutional obligation to take this case for review; however, this Court has, within its discretion, the power to grant a Writ of Certiorari and has, under its Rule No. 38, jurisdiction to consider the matters involved in this case for the following reasons:

1. Proper construction of Section 242 of Title 18, "Deprivation of Rights Under Color of Law", is involved.

2. The opinion of the Court of Appeals is in conflict with and results in direct contradiction of opinions of this Court.

QUESTIONS PRESENTED

The exact questions presented are these:

1. Does the action of an officer, whose authority to act under the provisions of the state laws is not put into operation by the facts as presented before the Court, and who inflicts an assault and battery upon a person whom he later treats as a prisoner, constitute a violation of Sec. 242 of Title 18, or is such action the individual act of the officer?

2. Does the instruction to the jury, which charges first that intent may not be presumed by the jury, (Sec. 242, requiring wilful deprivation of Civil Rights) and then further charging the jury that it is a well settled rule of law, which applies to both civil and criminal cases, that *intent is presumed and inferred from the result of the action*, give the jury a correct charge of the law by which to determine the Petitioners' guilt or innocence.

3. The Court should have sustained the Motion of Petitioners for an Acquittal because the evidence before the Court failed to show that the acts of the Petitioners were not the result of their individual action in their personal pursuit.

4. The count of the information charging an offense under Sec. 242 of Title 18 is subject to be quashed and dismissed when the same fails to allege and inform the Defendants, (your Petitioners) regarding the manner of or allege the authority which Petitioners claim was granted to them by the State of Texas, which authorizes and excuses their conduct.

5. The count of the information charging a conspiracy to violate Section 242 of Title 18 must also allege

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by what state authority the Petitioners excuse their actions as authorized by powers granted to them by the State of Texas.

6. The question as to whether or not in the case herein the Government relies upon the acts of the Defendants alone to show a conspiracy to have been in existance, and wherein the Defendants request a charge on circumstantial evidence, however, which charge may have been deficient, but since the Court did not charge the law of circumstantial evidence, were the Defendants then, after their request, entitled to have the Court fully charge on the law of circumstantial evidence?

STATUTES INVOLVED

Section 242, Title 18

Section 371, Title 18

SUPREME COURT DECISIONS CONFLICTING WITH THE DECISION OF THE COURT OF APPEALS

Civil Rights Cases, 109 U.S. 3; 3 S. Ct. 18; 27 L. Ed. 835

Screws v. United States, 65 S. Ct. 1031, 1039; 325 U.S. 91, 110.

STATEMENT

This case was tried to a jury in the United States District Court for the Western District of Texas in the San Antonio Division. The jury determined the facts

against the Petitioners on both counts in the information, so, for the purpose of the appeal to the Circuit Court and for the purpose of this application for writ of certiorari, it must be presumed that the contentions of the government prevailed against the contentions of the Defendants.

Therefore, it must be presumed, as brought out in the Government's cross-examination of the Defendants, that no facts existed which put in operation authority delegated by the State of Texas to peace officers.

The Petitioners appealed from the judgment entered in the trial court, and which judgment was affirmed by the Court of Appeals for the Fifth Circuit in a two-to-one decision. It is from this judgment affirming the judgment of the trial court that your Petitioners now apply to this Court for relief.

REASONS FOR GRANTING THE WRIT

As heretofore stated, this case is not one of those causes wherein this Court is obligated to take jurisdiction of the cause because of a statutory provision or because of the provisions of the Federal Constitution. Therefore, the jurisdiction of this Court is discretionary with the judges thereof.

The Petitioners submit that the questions to be determined in making a final disposition of the cause is one of great public interest. The public's interest is not in what becomes of the Petitioners, nor is it based upon the proposition that the Petitioners were officers and that the injured party was a Negro; but the public interest is in this: The public is entitled to know where the line of distinction is drawn between an act by an officer as an

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individual, which act he does during the time that he is a duly authorized and commissioned public officer, and an act by an officer, which act is in behalf of the state, and which then, if he abuses the power granted to him by the state, constitutes a deprivation of the civil rights of an inhabitant. In other words, the public is entitled to know and have this court determine when an officer acts as an individual and when he acts in behalf of the state in the exercise of delegated authority from the state.

Not only is the public at large entitled to know and have this Court clarify this question, but the thousands of peace officers who are now acting in behalf of the various states, counties, and municipalities are also entitled to know when their actions are their individual actions, and when their actions are such as come within the authority delegated to them by the various political subdivisions throughout the United States.

The public at large and the thousands upon thousands of peace officers throughout the United States are entitled to know,

First: Does Section 242 of Title 18 authorize a prosecution against a peace officer for having acted "under color of office", and is acting under color of office synonimous with the wording of Section 242, "Whoever, under color of any law, statute, ordinance, regulation, or custom,"?

Second: Whether or not an information is sufficient, under attack, which alleges that an officer acted under color of office instead of alleging that he acted under color of law or ordinance, etc.

Third: Whether or not a peace officer can, in his

individual capacity, engage in an affray and commit an assault and battery upon an individual, and, thereafter, falsely imprison the individual.

Fourth: Whether or not the charge of the Court, which first charges that, in order to convict the parties on trial, the jury must find that the Defendants wilfully intended to deprive the injured of his civil rights, and immediately thereafter charges that intent is presumed from the act committed or consummated, is such a conflict within itself as to require the case to be retired upon a new trial under proper instructions of the Court.

Fifth: Whether or not the Defendants on trial are entitled to have a full and complete instruction on the charge of circumstantial evidence, even though their requested charge on circumstantial evidence may have been insufficient or incorrect, wherein the Court's charge did not contain any charge regarding the law of circumstantial evidence.

Your Petitioners fully realize that they have been heard by a Court of Appeals on these questions, but they sincerely believe that these matters are of such vital interest to the public at large and to the thousands upon thousands of peace officers throughout the United States that this Court should review the decision of the Court of Appeals so that these matters and propositions of law can be fully clarified, and that the apparent conflict between the decision of the Court of Appeals and that of the Screws Case (Screws v. United States, 65 S. Ct. 1031, 1039; 325 U.S. 91, 110) and of the Civil Rights Cases (109 U.S. 3; 3 S. Ct. 18; 27 L. Ed. 835) can be fully clarified by this Court.

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Wherefore, the premises considered, your Petitioners pray that a Writ of Certiorari be directed to the United States Court of Appeals for the Fifth Circuit sitting in New Orleans, Louisiana, and that this Court take jurisdiction of this cause.

Accompanying this petition is the Brief of Petitioners.

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Brief of Petitioners in Support of the Foregoing Petition for Writ of Certiorari

Now come the Petitioners in the above entitled and numbered cause and here present their brief in support of their petition for Writ of Certiorari.

OPINION

The District Court did not write an opinion.

The United States Court of Appeals for the Fifth Circuit wrote a majority opinion and a dissenting opinion, both of which are copied and attached hereto.

AUTHORITIES WITH REFERENCE TO PETITIONERS' PROPOSITION REGARDING THE INDIVIDUAL ACTS OF THE PEACE OFFICER

Section 242 of Title 18 reads as follows:

> "Whoever, under color of any law, statute, ordinance, regulation or custom, wilfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabintant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be

fined not more than $1,000 or imprisoned not more than one year, or both."

Mr. Justice Bradley in the Civil Rights Cases, 109 U.S. 3; 3 S. Ct. 18; 27 L. Ed. 835, wrote as follows:

"In this connection, it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression cannot be impaired by the wrongful acts of individuals, unsupported by State authority, in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls or slander the good name of a fellow citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefore to the laws of the State where the

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wrongful acts are committed. Hence, in all those cases where the Constitution seeks to protect the rights of the citizen against discrimination and unjust laws of the State by prohibiting such laws, it is not individual offenses, but abrogation and denial of rights, which it denounces, and for which it clothes the Congress with power to provide a remedy. This abrogation and denial of rights, for which the States alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied. And the remedy to be provided must necessarily be predicated upon that wrong. It must assume that in the cases provided for, the evil or wrong actually committed rest upon some State law or State authority for its excuse and perpetration."

ARGUMENT

This Court very clearly sets out in the Civil Rights Cases that an individual can not deprive a person of his civil rights, and that, regardless of what the individual does as an individual, or how henious or how terrible his conduct may have been, it is only an invasion of and interference with civil rights if the act is that of an individual and not that of a state; that only the state can deprive a person of his civil rights. Thereafter, in the Screws case, this Court very plainly and distinctly held that if a person who was a duly commissioned and delegated officer of the state, would, in the exercise of this duly delegated authority, misuse and abuse his authority, such misuse would constitute a deprivation of civil rights "under color of law".

However, the Screws case held further, and very

distinctly held, that in every case in which officers of a state, acting in such a way, assaulted, injured or even murdered their prisoners, it did not necessarily constitute a deprivation of a right protected or secured by the Constitution and laws of the United States.

The case before the Court is one in which there is no dispute that the injured suffered a severe injury at the hands of the Petitioners, and it is certainly true that any person who believes in organized society and believes in the regulation of organized society, must frown upon the conduct of the Petitioners. But the whole question in this case is whether this conduct was such as constituted a deprivation of the civil rights, or whether it was conduct which resulted out of the individual acts of the Petitioners because of the conduct of the injured party in running over and killing a hunting dog which belonged to the Petitioners, and after so doing, attempting to run away from the scene. Thereafter, the Petitioners pursued the injured party, and as a result of the detention of the injured party, an affray followed. In this affray the injured party was severely injured. The Court of Appeals holds that under the facts it relates in the majority opinion that an individual who is apprehended by a officer of the law, "*acting under color of his office,* and is badly beaten, intimidated and imprisoned without ever being taken before a committing magistrate or a tribunal which would afford him due process of law and preserve his constitutional rights, manifestly he has been deprived of his rights, privileges and immunities within the meaning of the statute."

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AUTHORITIES WITH REFERENCE TO PETITIONERS' POSITION REGARDING CIRCUMSTANTIAL EVIDENCE

In the case of Anderson v. United States, 30 Fed. 2d 485, Judge Foster of the Fifth Circuit wrote:

> "It is apparent that conviction in this case depended entirely on the conclusions to be drawn by the jury from the circumstances shown. In this regard, appellant requested the following charge:
>
> "The court charges you that in this case the government relies for a conviction of the defendant, Melvin D. Anderson, upon circumstantial evidence alone. In order to warrant a conviction on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt; all the facts, (that is, the facts necessary to the conclusion) must be consistent with each other and with the main fact sought to be proved; and the circumstances, taken together, must be of a conclusive nature, leading on the whole, to a satisfactory conclusion, and producing in effect a reasonable and moral certainty, that the accused committed the offense charged. It is not sufficient that the circumstances coincide with, account for, and therefore render probable the guilt of the defendant; they must exclude every other reasonable hypothesis, except that of the defendant's guilt, and, unless they do so beyond a reasonable

doubt, you will find the said defendant, Melvin D. Anderson not guilty.

"It is a fundamental rule of evidence that, in order to support a conviction, circumstantial evidence must exclude every reasonable hypothesis, other than that of guilt. Nowhere in the general charge was the offense for which appellant was indicted plainly defined for enlightenment of the jury, nor was the jury charged regarding the rule applicable to circumstantial evidence. The requested charge above set out was enough to call the court's attention to the law applicable, and appellant had the right either to have the charge given or the jury properly instructed in the general charge. In these circumstances the refusal to give the charge was also prejudicial error."

ARGUMENT

Petitioners feel that since there is not direct evidence before the Court that a conspiracy existed, the fact that the Petitioners requested a charge on circumstantial evidence should have been sufficient to call the Court's attention to the question on circumstantial evidence in connection with the conspiracy. Since the Court failed to give a charge thereon, the same constituted plain error.

AUTHORITIES REGARDING THE INSUFFICIENT AND INCORRECT CHARGE OF THE TRIAL COURT ON THE MATTER OF WILFULNESS AND PRESUMED INTENTION

From the dissenting opinion of the Court of Ap-

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peals for the Fifth Circuit, which opinion was written by Justice Russell, we quote the following:

> "The offense for which the defendants were being tried was for a charge of violation of 18 U.S.C. Section 242, with the additional charge of having conspired to do so. Thus, the question of "wilfulness" and "specific intent" must have been properly determined not merely to determine guilt, but also must have been established before there was, in legal and constitutional contemplation, any offense at all. This plainly results from the decision of the four majority justices in *Screws v. United States,* 325 U.S. 91, 101. Indeed, it is there stated that the failure of the trial Court to properly instruct the jury upon the question of intent was an error 'so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, (that) we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial.' *Screws v. United States, supra,* p. 107. Consideration of the opinions of both the four majority justices and the three dissenting justices leads inescapably to the conclusion that in no event can the statute which forms the basis of the present prosecution be constitutionally applied, unless the statutory term "wilfully" be strictly held an essential ingredient of the offense and to require that the offense be perpetrated with the specific intent and purpose to deprive another of a constitutional right. It is not sufficient that the defendants have 'a generally bad purpose'. The three

dissenting justices in the *Screws* case were of the opinion that even with this application and construction the statute was unconstitutional. It is apparent, therefore, that the question here raised against the charge of the Court is, in essence, a constitutional question and goes to the vitals of the entire case.

"In the present case, the trial Judge, in his charge, fairly and ably submitted to the jury the principles of law properly applicable in the determination by the jury of the existence of the essential ingredient of "wilfulness" as set forth above. However, the Court in immediate connection therewith, apparently overlooking at the moment the distinction generally between general intent and specific intent in criminal law, (and of special moment in the present case), charged the jury, in addition to the other means for proving intent that that *'it is the law that a person intends the usual consequences of his acts'*, and further that 'wrongful acts knowingly or intentionally committed can neither be justified or excused on the ground of innocent intent. The color of the act determines the complexion of the intent. The intent to injure or defraud is presumed when the unlawful act, which results in loss or injury, is proved to have been knowingly committed. *It is a well settled rule, which the law applies to both criminal and civil cases, that the intent is presumed and inferred from the result of the action.*' (Italics supplied).

"It is true that immediately following the

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last quoted language, the Court instructed the jury of the requirements of a specific intent in the language set forth in the majority opinion. It seems clear, however, that for either, or both, of two reasons the unobjectionable portions of the charge did not remove the fatal taint inflicted by the language of the judge with reference to the intent legally presumed to follow from the commission of acts. Thus, even though the Court imposed the requirements of specific intent, the jury was, nevertheless, in effect told that it could be satisfied by the legal presumption resulting from the "action". With the evidence sufficient to show wholly unjustified and inhumane *acts* by the defendants the instruction was legally equivalent to the statement that if the defendants committed an unlawful *assault* upon Rasberry, this alone would furnish a legal presumption that the defendants had a deliberate and wilful purpose to deprive him of a constitutional right. This entirely misconceives, in the nature of the present case, the requirement that *the offense* be wilfully committed, that is, committed with specific intent. The Federal offense is not the unlawful assault, but the wilful deprivation of civil rights. It is a well established rule of law that where wilfulness is an essential ingredient of an offense the specific intent must be proved as an independent fact and can not be presumed as a matter of law from the commission of an unlawful act. *Hargrove v. United States,* (5 Cir.) 67 F. 2d 820, 823; *Hubbard v. United States,* 79 F. 2d

850, 853; 22 C.J.S. Criminal Law, Sections 32, 33, pp. 91, 92; Brill's Cyclopedia Criminal Law, Section 94. On the other reason, if the validity of the conclusion that the effect of the effect of the charge was to instruct the jury that the requisite specific intent could be established by the legal presumptions referred to could be validly questioned, which may not be logically done, still it must be said that the instructions are conflicting. They, therefore, must be legally held to have cancelled, each, the effect of the other, and there was no proper charge given on specific intent. Thus, in either view there was clearly a failure to properly instruct the jury upon 'the essential ingredients of the only offense on which the conviction could rest.' This failure, under the ruling in the *Screws* case, supra, requires the grant of a new trial."

ARGUMENT

The Petitioners submit that the dissenting opinion is a proper enunciation of the law and is in accordance with the holding of the Supreme Court of the United States in the Screws case, which Judge Russell cites in his dissenting opinion.

WHEREFORE, the premises considered, the Petitioners pray that this Court grant its Writ of Certiorari directed to the United States Court of Appeals for the Fifth Circuit, and direct that the Clerk of such Court send to the Clerk of this Court the necessary records so that this Court can review the decision of the Court of Appeals and the judgment of the trial court.

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APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 13,245

BRUNO A. KOEHLER and HUGO W. ACKERMANN,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS.

(May 25, 1951)

Before HOLMES, McCORD and RUSSELL, Circuit Judges.

McCORD, Circuit Judge: Appellants, Bruno Koehler and Hugo Ackermann, were tried and convicted for violation of Section 242 of Title 18, USCA, and also of a conspiracy to violate that statute.[1]

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[1] Section 242 of Title 18, USCA, provides:

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

The information upon which their prosecution was based alleges that the defendants entered into a conspiracy for the purpose of depriving one Efram Rasberry of his rights, privileges and immunities secured to him under the Constitution of the United States; namely, the right, privilege, or immunity to be secure in his person while in the custody of the State of Texas; the right, privilege and immunity not to be subjected to punishment without due process of law; the right, privilege and immunity not to be denied the equal protection of the laws of the State of Texas; the right and privilege to be immune while in the custody of persons acting under color of the laws of the State of Texas from illegal assault and battery by any person exercising the authority of said State; and the right and privilege to be tried by due process of law, and if found guilty, to be sentenced and punished in accordance with the laws of the State of Texas. It was thereafter alleged in the first count of the information that the object of the conspiracy of the defendant was to inflict illegal summary punishment upon Efram Rasberry, and that in furtherance of this conspiracy, the defendants committed certain overt acts.

The second count of the information charged that on or about August 23rd and August 24th, 1949, appellant, Bruno Koehler, a duly elected, qualified and acting constable of Guadalupe County, Texas, acting under color of the laws and statues of the State of Texas, wilfully subjected and caused to be subjected Efram Rasberry, a resident of the State of Texas, to the deprivation of certain rights, privileges and immunities secured to him and protected by the Fourteenth Amendment to the Constitution of the United States. Appellant, Hugo W. Ackermann, was alleged o have wilfully aided, abetted

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and counseled Koehler in the commission of this offense.

Defendants, in answer, denied the allegations of both the conspiracy and substantive counts of the information, whereupon they were tried before a jury and found guilty on both counts. Upon conviction, the trial court set punishment for each of the defendants at a $500.00 fine, and six months in jail.

The principal questions confronting us for determination are (1) whether there is substantial evidence to support the verdict and sustain the convictions under both counts of the information; and (2) whether the trial court committed reversible error in refusing to grant defendants' requested instruction on circumstantial evidence, and in granting certain other charges which, it is claimed, were erroneous and prejudicial. Specifically, appellants deny there was sufficient evidence to justify a finding that they acted "under color of the laws and statutes of the State of Texas", or that they wilfully subjected Rasberry to any deprivation of his constitutional rights, privileges and immunities.

The evidence reveals that on the night of August 23, 1949, Efram Rasberry, accompanied by a minister by the name of Ernest Benzs, was traveling in an automobile toward Marion, Texas. When they arrived at a placed called Cibolo Creek a number of hounds belonging to the appellant, Koehler, began to run across the highway. Rasberry, who was driving, slowed the car down, and one of the hounds was either hit by the car or ran into it. Afterwards, Rasberry and his companion, Benzs, proceeded on into the town of Marion, and were followed by appellants in an automobile. Appellants blew their siren, and stopped Rasberry's car, stating, "Didn't you know that I am the law?". Rasberry replied, "Yes,

sir, Mr. Koehler, I know you are the law." Koehler then stated, "Get out of here, you are under arrest". Koehler then pulled Rasberry out of his car, after which both the appellants beat him with their fists or a club, while Rasberry's companion, Benzs, hid himself behind some bushes to escape being caught. Thereafter, appellants took Rasberry to a bar owned by Koehler in Marion, where he was held in custody without anyone being allowed to see him. While Rasberry was there the appellant, Ackerman, picked up a pet alligator owned by Koehler and kept in a washtub in the bar, and placed it against Rasberry's naked body. Koehler pointed a pistol at Rasberry and told him to say his prayers; that if the dog Rasberry had hit with his car died, he (Koehler) was going to hang him, and that while he was hanging he would stay nearby with a gun, so nobody could cut him down.

Appellants later placed Rasberry in their car and drove over to the home of one Bob Miller. Koehler told Miller, "That is old Rasberry; he has been out with your daughter, running around with your daughter, and I am going to put him in jail, and I want you to take my gun and kill him", to which Miller replied, "No, I could do nothing like that". Koehler then stated, "You don't want to kill him, he has been out with Herbert Butler's wife * * * if you haven't got any gun, come on over; I am going to put him in jail; come on over, and get my gun and kill him. He is running around with your daughter, and he has done run over my dogs, and if you don't kill him, I am going to kill him and her both in the morning, if those dogs die." Thereafter, appellants returned Rasberry to the jail at Marion, Texas, and the following day he was removed to the Guadalupe County jail.

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The doctor who was called to examine Rasberry the day after he was beaten testified that at that time his head was swollen, that he had a cut on his lower lip and a cut on his forehead which required stitches, and that both lips were swollen and lacerated and he could not talk intelligibly. Rasberry testified that he was unconscious until the second day after the difficulty, at which time he was at his home in bed.

After he had placed Rasberry in jail, Koehler delivered to the local Justice of the Peace some unsworn complaints charging Rasberry with driving a motor vehicle without good brakes and without lights. The complaints were not filed with the court because they were not sworn to, and no other charges were ever filed or made against Rasberry.

We are of opinion there is substantial evidence to support the verdict as to the guilt of both appellants. Where, as here, an individual is apprehended by an officer of the law acting under color of his office, and is badly beaten, intimidated and imprisoned without ever being taken before a committing magistrate or a tribunal which would afford him due process of law and preserve his constitutional rights, manifestly he has been deprived of his rights, privileges and immunities within the meaning of the statute. Title 18, USCA, Section 242; *Screws v. United States,* 325 *U.S.* 91; *United States v. Classic,* 313 *U.S.* 299; *Crews v. United States,* 160 F. 2d 746; *Jay G. Williams v. United States,* — U.S. — (in M.S.), decided April 23, 1951. Moreover, the jury was warranted under the evidence adduced in finding that appellants acted wilfully, and that they intentionally subjected Rasberry to illegal and summary punishment without due process of law. In this con-

nection, the language of this court in the case of *Crews v. United States*, 160 F. 2d 746, at page 750, is particularly applicable here:

> "An officer of the law undoubtedly knows that a person arrested by him for an offense has the constitutional right to a trial under the law, and if the jury should believe from the evidence beyond a reasonable doubt that such an officer wilfully failed to accord to one arrested by him the opportunity for such a trial but substituted instead his own trial by ordeal, such jury would be justified in finding that such a denial of such constitutional right was consciously and wilfully made. One is generally presumed to have intended the normal and reasonable consequences of his acts."

There is abundant evidence to warrant the finding that appellants here acted "under color of the laws and statutes of the State of Texas". The use of the police siren while in pursuit of Rasberry, the statement to Rasberry, "Didn't you know that I am the law?", the action of appellants in placing Rasberry "under arrest" and lodging him in jail, as well as the delivery of the complaints charging him with defective brakes and lights, clearly support and warrant the inference of the jury that appellants acted "under color of law" in committing the offense charged. Furthermore, the evidence conclusively reveals that Ackermann and Koehler were acting in concert in perpetrating the offense.*

We find no merit in the contention that the trial court erred in refusing to give defendants' requested instruction on circumstantial evidence. Here, the con-

* On cross-examination, in reply to a question as to whether or not he was "assisting Mr. Koehler", appellant Ackermann answered, "Sure, I was assisting him." Ackermann later added, "I understood that I was supposed to work with Mr. Koehler".

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viction did not depend solely on circumstantial evidence, and such charge was clearly erroneous.. Cf. *Bedell v. United States,* 78 F. 2d 358; *U. S. v. Skidmore,* 123 F. 2d 604.

We further find no merit in the contention that the trial court committed reversible error in charging the jury that "the intent (of appellants) is presumed and inferred from the result of the action." The appellants interposed no objection to that portion of the charge now complained of, and the trial court may not now be put in error in this regard. *Popham v. United States,* 11 F. 2d 966. The record also reveals that after such statement, the trial court continued its charge:

> "The proof of a general intent to do Rasberry wrong is not sufficient, but a specific intent to deprive him of a Constitutional right is a burden the law casts upon the Government in this case. Neither color of law nor specific intent may be presumed by you gentlemen, but both color of law and specific intent must be proven by the government beyond a reasonable doubt". See *Screws v. U. S.,* 325 U.S. 91.

We have carefully examined each and every assignment of error by appellants, and find them all, without exception, wholly without substance or merit. The charge of the trial court, viewed fully and fairly in its entirety, substantially preserved every right of appellants and every important issue in the case for the consideration of the jury.

We find no reversible error in the record, and the judgment is accordingly

AFFIRMED.

RUSSELL, Circuit Judge, dissenting.

Were it possible to adjudge the complaint of the defendants upon the basis alone of their moral right to assert it, as distinguished from the legal rights which must be preserved to every person accused of crime, and if this moral question could be considered alone, without regard for legal precedent by which we are bound and which we may establish, the defendants' cause could be easily disposed of. But on the contrary, of course, we must be guided by legal principles. It is upon the application of these that a difference arises between me and my colleagues.

The defendants' assignment of error upon those portions of the charge of the Court which instructed the jury that in determining the question of intent it was the law that a person intended the usual consequences of his acts, and that intent is legally presumed and inferred from the result of the action, raises a question much more serious and fundamental than is presented by a merely erroneous charge in the usual criminal case.

The offense for which the defendants were being tried was for a charge of violation of 18 U. S. C. Section 242, with the additional charge of having conspired to do so. Thus, the question of "wilfulness" and "specific intent" must have been properly determined not merely to determine guilt, but also must have been established before there was, in legal and constitutional contemplation, any offense at all. This plainly results from the decision of the four majority justices in *Screws v. United States*, 325 U.S. 91, 101. Indeed, it is there stated that the failure of the trial Court to properly instruct the jury upon the question of intent was an error "so fundamental as not to submit to the jury the

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essential ingredients of the only offense on which the conviction could rest, (that) we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial." *Screws v. United States, supra,* p. 107. Consideration of the opinions of both the four majority justices and the three dissenting justices leads inescapably to the conclusion that in no event can the statute which forms the basis of the present prosecution be constitutionally applied, unless the statutory term "wilfully" be strictly held an essential ingredient of the offense and to require that the offense be perpetrated with the specific intent and purpose to deprive another of a constitutional right. It is not sufficient that the defendants have "a generally bad purpose." The three dissenting justices in the *Screws* case were of the opinion that even with this application and construction the statute was unconstitutional. It is apparent, therefore, that the quesion here raised against the charge of the Court is, in essence, a constitutional question and goes to the vitals of the entire case.

In the present case, the trial Judge, in his charge, fairly and ably submitted to the jury the principles of law properly applicable in the determination by the jury of the existence of the essential ingredient of "wilfulness" as set forth above. However, the Court in immediate connection therewith, apparently overlooking at the moment the distinction generally between general intent and specific intent in criminal law, (and of special moment in the present case), charged the jury, in addition to the other means for proving intent that "*it is the law that a person intends the usual consequences of his acts,*" and further that "wrongful acts knowingly or intentionally committed can neither be justified or

excused on the ground of innocent intent. The color of the act determines the complexion of the intent. The intent to injure or defraud is presumed when the unlawful act, which results in loss or injury, is proved to have been knowingly committed. *It is a well settled rule, which the law applies to both criminal and civil cases, that the intent is presumed and inferred from the result of the action.*" (Italics supplied).

It is true that immediately following the last quoted language the Court instructed the jury of the requirements of a specific intent in the language set forth in the majority opinion. It seems clear, however, that for either, or both, of two reasons the unobjectionable portions of the charge did not remove the fatal taint inflicted by the language of the judge with reference to the intent legally presumed to follow from the commission of acts. Thus, even though the Court imposed the requirement of specific intent, the jury was, nevertheless, in effect told that it could be satisfied by the legal presumption resulting from the "action". With the evidence sufficient to show wholly unjustified and inhumane *acts* by the defendants the instruction was legally equivalent to the statement that if the defendants committed an unlawful *assault* upon Rasberry, this alone would furnish a legal presumption that the defendants had a deliberate and wilful purpose to deprive him of a constitutional right. This entirely misconceives, in the nature of the present case, the requirement that *the offense* be wilfully committed, that is, committed with specific intent. The Federal offense is not the unlawful assault, but the wilful deprivation of civil rights.[1] It

[1] The statement in **Crews v. United States**, 160 F. 2d. 746, 750 was not made in defining a legal instruction to the jury. It was the expression of the legal conclusion of the appellate Court upon consideration of the sufficiency of the evidence.

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is a well established rule of law that where wilfulness is an essential ingredient of an offense the specific intent must be proved as an independent fact and can not be presumed as a matter of law from the commission of an unlawful act. *Hargrove v. United States,* (5 Cir.) 67 F. 2d 820, 823; *Hubbard v. United States,* 79 F. 2d 850, 853; 22 C. J. S. Criminal Law, Sections 32, 33, pp. 91, 92; Brill's Cyclopedia Criminal Law, Section 94. On the other reason, if the vadity of the conclusion that the effect of the charge was to instruct the jury that the requisite specific intent could be established by the legal presumptions referred to could be validly questioned, which may not be logically done, still it must be said that the instructions are conflicting. They, therefore, must be legally held to have cancelled, each, the effect of the other, and there was no proper charge given on specific intent. Thus, in either view there was clearly a failure to properly instruct the jury upon "the essential ingredients of the only offense on which the conviction could rest." This failure, under the ruling in the *Screws* case, *supra,* requires the grant of a new trial.

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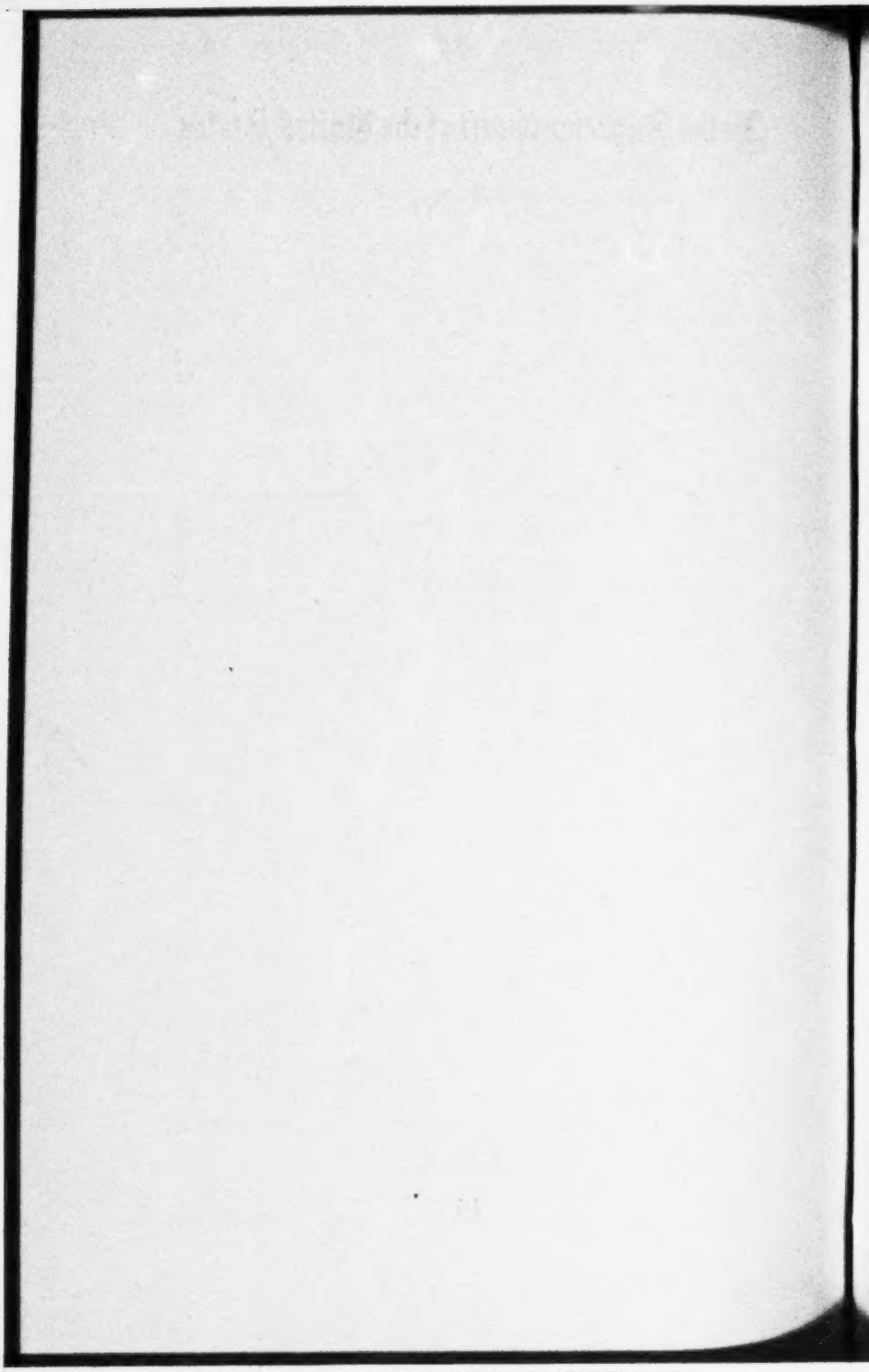

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 199

BRUNO A. KOEHLER AND HUGO W. ACKERMANN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 376-384) are reported at 189 F. 2d 711.

JURISDICTION

The judgment of the Court of Appeals was entered on May 25, 1951 (R. 384), and a petition for rehearing was denied on June 25, 1951 (R. 389). The petition for a writ of certiorari was filed on July 23, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether a state officer who arrests a person under color of his office is acting under color of law within the meaning of 18 U.S.C. 242 where, subsequent to the arrest, he subjects the prisoner to illegal assault and battery.

2. Whether the instructions to the jury on the requirement of intent were correct.

3. Whether the trial judge on his own motion should have instructed the jury as to the law of circumstantial evidence as applied to conspiracy where the conviction did not depend upon circumstantial evidence.

STATUTES AND RULE INVOLVED

18 U.S.C. 242:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

18 U.S.C. 371:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency

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thereof in any manner of for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Rule 30, F. R. Crim. P.:

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT

Petitioners were convicted in the District Court for the Western District of Texas on both counts of an information (R. 2-5). The first count, under

18 U.S.C. 371, charged that petitioner Koehler, a duly elected constable of Guadalupe County, Texas, acting under color of the laws and statutes of Texas creating his office and prescribing its duties, and petitioner Ackermann conspired to wilfully subject Efram Rasberry to the deprivation of his rights, privileges and immunities under the Fourteenth Amendment to be secure in his person while in custody and not to be punished without due process of law. The object of the conspiracy was alleged to be illegal summary punishment of Rasberry. Seven overt acts were set out. The second count, under 18 U.S.C. 242, alleged that Koehler, aided and abetted by Ackermann, wilfully subjected Rasberry to the deprivation of specified rights under the Fourteenth Amendment by arresting him and assaulting him for the purpose of inflicting summary punishment. Petitioners were tried before a jury, found guilty on both counts (R. 359), and each was sentenced generally to pay a fine of $500 and to six months' imprisonment (R. 362-363).

The evidence shows that Efram Rasberry, a middle-aged Negro in rather poor health (R. 226), accompanied by a Negro minister named Ernest Benzs, were traveling in an automobile toward Marion, Texas, on the night of August 23, 1949. When they arrived at a place called Cibolo Creek a number of hounds belonging to petitioner Koehler, a qualified constable (R. 34-40), began to run across the highway. Rasberry, who was driv-

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ing, slowed the car, and one of the hounds was either hit by the car or ran into it. Rasberry and Benzs did not stop but proceeded on to Marion, pursued by Koehler and his "deputy" (R. 175, 212-214, 272) Ackermann, in an automobile. (R. 41, 74.) Petitioners sounded their siren (R. 86, 156, 163, 206), flashed their red search light (R. 86, 206), and finally forced Rasberry to the curb (R. 206). At this time Koehler stated: "Why didn't you stop, didn't you know I am the Law?" Rasberry replied: "Yes sir, Mr. Koehler, I know you are the Law." (R. 163.) Koehler then stated: "Get out of here; you are under arrest" (R. 225). Koehler then pulled Rasberry out of his car (R. 41, 75), after which both Koehler and Ackermann beat him with their fists or other weapons (R. 41, 75, 156-157, 207), while Benzs hid in some bushes to avoid capture.

Thereafter, petitioners took Rasberry to a saloon in Marion owned by Koehler, where he was held in custody (R. 92-93), without anyone being permitted to see him (R. 78). During the time Rasberry was in custody in the saloon, Ackermann picked up a pet alligator owned by Koehler and kept in a washtub in the saloon, and placed it against Rasberry's bare stomach (R. 94). Koehler pointed a pistol at Rasberry and told him to say his prayers; that if the dog died, he would hang Rasberry and that while Rasberry was hanging he would stay nearby with a gun, so that no one could

cut him down. Ackermann also drew his pistol. (R. 94-95.)

Later petitioners placed Rasberry in their car and drove to the home of one Robert Miller where the following conversation took place (R. 95-97, 126):

> Koehler: "That is old Rasberry; he has been out with your daughter, running around with your daughter, and I am going to put him in jail, and I want you to take my gun and kill him."
>
> Miller: "No, I could not do nothing like that."
>
> Koehler: "You don't want to kill him he has been out with Herbert Butler's wife [Miller's daughter] * * * If you haven't got any gun, come on over; I am going to put him in jail; come on over, and get my gun and kill him. He is running around with your daughter, and he has done run over my dogs, and if you don't kill him, I am going to kill him and her both in the morning, if those dogs die."

Petitioners later placed Rasberry in the Marion jail (R. 97). The following day he was removed to the Guadalupe County Jail (R. 157).

The doctor who was called to examine Rasberry the day after he was beaten testified that at that time his head was swollen, he had a cut on his lower lip and a cut on his head which required stitches, both lips were swollen and lacerated, and he could not talk intelligibly (R. 63-65). Rasberry testified that he was unconscious until the ambu-

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lance came for him the second day following (R. 44). There was testimony that he was unrecognizable the night of the beating (R. 111).

After he had placed Rasberry in jail, Koehler delivered to the local justice of the peace two complaints charging Rasberry with driving a motor vehicle without good brakes and without lights (R. 143-146, 338-339). The complaints were never filed because they were not sworn (R. 145). No other charges were made or filed against Rasberry.

ARGUMENT

1. Petitioners' principal contention[1] is that the Court of Appeals erred in holding that—

[1] Petitioners' argument is seemingly stated in four different ways in numbers 1, 3, 4, and 5 of their questions presented (Pet. 2-3). Actually they argue only the third of these questions (Pet. 11-12).

In their first question (Pet. 2), they query whether assault and battery by an officer followed by later treatment of the victim as a prisoner would violate Section 242. Since the question is based on a false premise it does not merit discussion. The trial judge charged the jury (R. 324) that they must find that "Koehler arrested and detained said Rasberry, and while the said Rasberry was in his custody said Koehler * * * assaulted the said Rasberry for the purpose of inflicting summary punishment." It is unnecessary to summarize once more the substantial evidence which entitled the jury to find that the arrest came before the beating.

In their fourth and fifth questions petitioners suggest that both counts of the indictment should have been quashed because they failed to allege by what authority petitioners purported to act in beating Rasberry. A reading of the counts will show that they used almost the exact language of Section 242. For example, the substantive count alleged that Koehler "under color of the laws and statutes of the State of Texas" subjected Rasberry to deprivation of his rights. Almost the very language of this information was approved in *Catlette* v. *United States*, 132 F. 2d 902 (C.A. 4). If petitioners desired additional information their proper procedure was to request a bill of particulars.

> Where, as here, an individual is apprehended by an officer of the law acting under color of his office, and is badly beaten, intimidated and imprisoned without ever being taken before a committing magistrate or a tribunal which would afford him due process of law and preserve his constitutional rights, manifestly he has been deprived of his rights, privileges and immunities within the meaning of the statute. [R. 379-380.]

The decisions of this Court establish that, on the facts summarized above, petitioners' acts were done under color of law. "It is clear that under 'color' of law means under 'pretense' of law." Douglas, J., in *Screws* v. *United States,* 325 U. S. 91, 111. "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *United States* v. *Classic,* 313 U. S. 299, 326, reiterated by Douglas, J., in the *Screws* case (325 U. S. at 109) and in *Williams* v. *United States,* 341 U. S. 97, 99. In view of petitioner Koehler's official position and the assertion of his authority in arresting Rasberry, there can be no doubt that petitioners acted under color of law. The jury so found under an explicit instruction that before they could convict they must find, *inter alia,* that "Koehler [took] Rasberry into custody under color of law" (R. 322). The trial judge (R. 319), consistently with the decisions of this Court cited

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above, defined "color of law" as "mere semblance of legal right" (see *Williams* v. *United States,* 341 U. S. at 100), which "does not necessarily mean the exercise of some specific legal authority vested in an officer of the law, but also semblance, appearance and pretense and implies, in the language of the statute, that the act to which it applies need not necessarily have the real characteristics of a legal act. Therefore, we do not have in this case any question as to whether the defendant, Koehler, in taking Rasberry into custody, acted under authority of any law of Texas, but whether or not the taking of Rasberry into custody was done under color of the law of Texas, state, county, or municipal, arising out of the official position held by the defendant Koehler." Substantially the same instructions were upheld in *Williams* v. *United States,* 341 U. S. at 100 (compare R. 317-319 with R. 319-321, No. 365, O. T. 1950). As this Court there said, they "drew the line between official and unofficial conduct which we explored in *Screws* v. *United States, supra,* 111, and gave petitioner all of the protection which 'color of' law as used in § 20 [§ 242] offers."

Petitioners' protest that their actions were purely individual, not clothed with and without authority under state law, is therefore unavailing. "The evidence has nullified any pretense that petitioners acted as individuals, about their personal though nefarious business. They used the power of official place in all that was done. The verdict

has foreclosed semblance of any claim that only private matters, not touching official functions, were involved." Rutledge, J., in *Screws* v. *United States,* 325 U. S. at 115; see also *Catlette* v. *United States,* 132 F. 2d 902 (C. A. 4); *United States* v. *Trierweiler,* 52 F. Supp. 4 (E. D. Ill.).

2. Petitioners also contend (Pet. 2, 6, 14-18) that the instructions to the jury were erroneous because they included language to the effect that intent is generally presumed and inferred from action.

On this aspect of the case, the trial judge first told the jury that the word "wilfully" in Section 242 has "a very distinct and definite meaning," and that "It is not sufficient that the defendants here had generally a bad purpose in doing the things they did. In order to convict it is necessary for the jury to find that the defendants had in mind the specific purpose of depriving Rasberry of rights, privileges and immunities secured to him and protected by the Fourteenth Amendment to the Constitution of the United States, to-wit," the rights, privileges, and immunities specified in the information. He also instructed that "in determining whether this requisite of wilful intent was present in this case you are entitled to consider all the attendant circumstances; the malice, if any, of the defendants towards Rasberry, the weapons used in the assault, if you find any were used; and the character and duration of the provocation of the assault and the time and manner

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in which it was carried out. All these facts and circumstances may be taken into consideration from the evidence that has been submitted for the purpose of determining whether the acts of the defendants were wilful and for the deliberate and wilful purpose of depriving Rasberry of his Constitutional right to be tried by a jury just like everyone else." The judge then explained that intent "is something that exists in a man's mind" and which must be judged "by his intelligence, as shown by the evidence; by his experience in life, as shown by the evidence, and generally by judging him as reasonably prudent persons, experienced in the affairs of everyday life, judge each other, and it is the law that a person intends the usual consequences of his acts." (R. 320-321.)

All these instructions were substantially identical with the instructions sustained in *Williams* v. *United States,* 341 U. S. 97 (compare R. 319-321 with R. 322-324, No. 365, O. T. 1950). The judge here added that "The color of the act determines the complexion of the intent," and that "It is a well settled rule, which the law applies to both criminal and civil cases, that the intent is presumed and inferred from the result of the action." (R. 321.) Finally, as in the *Williams* case, the judge instructed (R. 321-322; compare R. 324, No. 365, O. T. 1950):

> The proof of a general intent to do Rasberry wrong is not sufficient, but a specific intent to deprive him of a Constitutional right

is a burden the law casts upon the Government in this case. Neither color of law nor specific intent may be presumed by you gentlemen, but both color of law and specific intent must be proven by the government beyond a reasonable doubt.

Now, in concluding this part of the court's charge, let me summarize the questions you have to determine:

1. Did the defendant Koehler take Rasberry into custody under color of law?

2. Did the defendants specifically intend to deprive Rasberry of a Constitutional right guaranteed to him by our Federal Constitution?

3. Has the Government established these two essentials to your satisfaction beyond a reasonable doubt?

If the Government has done so, it is your duty to find the defendant guilty in this case.

If you have a reasonable doubt upon either of the two essentials named above it is your duty to acquit the defendants.

Petitioners interposed no objection to these portions of the charge (see R. 309, 328), which was submitted to them the day before the jury were instructed (R. 309). They failed to point out the error if any to the court and should not now be heard to complain. Rule 30, F. R. Crim. P.

In any event, the instructions, read as a whole, were not erroneous. In the portion of his instructions now challenged by petitioners, the judge was obviously explaining in a general way how

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the jury should determine whether petitioners had the specific intent to deprive Rasberry of his constitutional rights, which he had previously instructed was a requisite to conviction. The judge did not err in telling the jury that intent is impossible to prove by direct evidence and can only be inferred from action.

Finally, any possible infirmity in the portions of the instructions which petitioners criticize could not possibly have misled the jury as to the intent they must find before they could convict. As has been shown, both before and following the criticized instructions the judge emphasized that a general bad intent was insufficient and that the jury must find that petitioners had a specific intent to deprive Rasberry of his constitutional rights as specified in the information.

3. Finally, petitioners insist (Pet. 3, 6, 14) that the trial judge on his own motion should have given an instruction on the law of circumstantial evidence as applied to conspiracy. Their proffered instruction on circumstantial evidence which was refused related only to wilfulness and intent (R. 357). Before the charge was given petitioners renewed their request for an instruction on circumstantial evidence, but only as it related to wilfulness. Now they claim that on the basis of the requested charge, the court of its own motion should have instructed as to the law of circumstantial evidence relating to conspiracies.

The trial judge correctly charged the jury as to what constitutes a conspiracy—an "agreement or combination on the part of the parties, by concerted action, to do an unlawful thing" (R. 313)—and that (R. 314) "in order for you to convict under this conspiracy count, you must believe beyond a reasonable doubt, first, that an unlawful agreement or understanding existed between the alleged conspirators, as charged, and second, that some one or more of these overt acts were actually committed as charged." In view of the direct evidence, including petitioners' own testimony (see R. 156, 157, 206, 207, 209, 210, 214-215) that they were acting in concert, petitioners were entitled to no more (*United States* v. *Skidmore,* 123 F. 2d 604 (C. A. 7), certiorari denied, 315 U. S. 800; *Bedell* v. *United States,* 78 F. 2d 358 (C. A. 8), certiorari denied, 296 U. S. 628), especially in the absence of a request for a specific instruction. Rule 30, F. R. Crim. P.

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CONCLUSION

The decision below is correct. No conflict of decisions is involved. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1951.

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Supreme Court of the United States

NO. 199 - OCTOBER TERM, 1951

BRUNO A. KOEHLER, AND HUGO W. ACKERMANN,
PETITIONERS

versus

THE UNITED STATES OF AMERICA,
RESPONDENT

MOTION FOR REHEARING ON PETITION FOR CERTIORARI OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MOTION FOR REHEARING

Now comes Bruno A. Koehler and Hugo W. Ackermann and here now move the Court to reconsider their petition for Writ of Certiorari to review a judgement entered in this Cause on May 25, 1951, on which Petitioner's Motion for rehearing was denied on June 25, 1951, by the United States Court of Appeals for the Fifth Circuit.

Your petitioners again re-urge each of the questions presented, in their original petition which are as follows:

The exact questions presented are these:

1. Does the action of an officer, whose authority to act under the provisions of the state laws is not put into operation by the facts as presented before the Court, and who inflicts an assault and battery upon a person whom he later treats as a prisoner, constitute a violation of Sec. 242 of Title 18, or is such action the individual act of the officer?

2. Does the instruction to the jury, which charges first that intent may not be presumed by the jury. (Sec. 242, requiring wilful deprivation of Civil Rights) and then further charging the jury that it is a well settled rule of law, which applies to both civil and criminal cases, that intent is presumed and inferred from the result of the action, give the jury a correct charge of the law by which to determine the Petitioners' guilt or innocence?

3. The Court should have sustained the Motion of Petitioners for an Acquittal because the evidence before the Court failed to show that the acts of the Petitioners were not the result of their individual action in their personal pursuit.

4. The count of the information charging an offense under Sec. 242 of Title 18 is subject to be quashed and dismissed when the same fails to allege and inform the Defendants, (your Petitioners) regarding the manner of or allege the authority which Petitioners claim was granted to them by the State of Texas, which authorizes and excuses their conduct.

5. The count of the information charging a conspiracy to violate Section 242 of Title 18 must also allege by what state authority the Petitioners' excuse their actions as authorized by powers granted to them by the State of Texas.

6. The question as to whether or not in the case herein the Government relies upon the acts of the Defendants alone to shown a conspiracy to have been in existance, and wherein the Defendants request a charge on circumstantial evidence, however, which charge may have been deficient, but since the Court did not charge the law of circumstantial evidence, were the Defendants then, after their request, entitled to have the Court fully charge on the law of circumstantial evidence?

In addition to the matters presented to support their original petition, your petitioners would show to the Court the following additional reasons for the granting of this writ.

Mr. Justice Jackson in his dissenting memorandum points out that when ever a charge of a trial court tells the jury that they can convict an accused upon a presumption, instead of requiring the government to produce evidence and meet the burden of proof heretofore required of the government, *that such would constitute the importation of a novel, and uppermost, a dangerous principal of law.*

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Your petitioners note with great interest the views of the meaning of a denial of a petition for certiorari by your body, which Mr. Justice Frankfurter set out in *Maryland v. Baltimore Radio Show, Inc.* 338 U. S. 912. There Mr. Justice Frankfurter declares that the denial does not mean that your body agrees with the holdings of the Court below.

Now in this connection your petitioners would like to call to the attention of the Court the effect of such matters upon the Justice Department of our Government by quoting the brief of the United States in the Court below, which reads:

> "Fortunately, with respect to appellants' belief that the circumstantial evidence charge was required because the element of wilfulness was unsupported by direct evidence, extensive argument is not required to dispose of this contention. In *Crews v. United States*, 160 F. 2d 746, this Honorable Court sustained a conviction for an offense similar to that described in the Second Count of the instant case. In appeal of the Crews case, appellant's attorney on page 24 of his brief, stated:
>
> "Since it was permissible, indeed necessary, to determine the presence or absence of Crews' specific intent by circumstantial evidence, we thought, and still think, that our requested charge 19 (297) should have been given, because, as we stated when taking our exceptions, the familiar law of how and under what circumstances a relevant fact may be proved by circumstantial evidence is applicable to this request. The request was as follows:
>
> '19. The defendant's specific intent may be proved by circumstantial evidence. If it is proved

by circumstantial evidence alone, the evidence must be of such a nature as to exclude beyond a reasonable doubt every reasonable hypothesis except that in doing the acts alleged the defendant committed them with the intent of depriving McFadden of a constitutional right. If the evidence is reasonably susceptible of any other hypothesis, the defendant should be acquitted."'
This Honorable Court did not discuss in its opinion this contention of Crews, but the court did point, on page 750 to the existence of direct evidence in the case, and, on the same page, discussing the question of intent, made the familiar and well-established observation that:
"An officer of the law undoubtedly knows that a person arrested by him for an offense has the constitutional right to a trial under the law, and if the jury should believe from the evidence beyond a reasonable doubt that such an officer wilfully failed to accord to one arrested by him the opportunity for such a trial but substituted instead his own trial by ordeal, such jury would be justified in finding that such a denial of such constitutional right was consciously and wilfully made. One is generally presumed to have intended the normal and reasonable consequences of his acts."

We assume, therefore, that this Honorable Court was satisfied that there was direct evidence that the appellant Crews had acted wilfully, or that the court's charge was a fair one without the requested circumstantial evidence instruction.. Indeed, this Honorable Court did characterize the charge of the trial court in the Crews case as being "fair, full and able". (p. 750). *A comparison of the charge of the trial court in the instant case* (R. 310-328) *with the record in this Honorable Court of the Crews case will show that the court's charge in the instant case followed very closely that of the Crews case.*"

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From considering the foregoing argument made by the United States in its brief in the Circuit Court, we have a good concrete illustration of what will be done with the opinion in this case.

The trial court gave its charge, which if sustained, revolutionizes American Criminal Law by substituting presumptions for evidence and thereby putting the burden of proof upon the Defendant. The Circuit Court does not touch on the question in its opinion, and now what is to step the Department of Justice to again put up the same argument in the next case tried, as it has done in this case.

To each of the members of this court your petitioners now call to you as a voice in the wilderness, to apply to their cause, before you, the Golden Rule, which is this case is: "Do not approve the trial of these petitioners, upon a principal of law, by which neither you, nor any other free man, would expect to have his actions judged and measured."

On these bases, your petitioners request that this Court reconsider its action of denying their application for Certiorari and that the order of denying same be set aside and that the Writ of Certiorari then be granted.

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS

By:_____
Elbert R. Jandt

I, Elbert R. Jandt, Attorney for the Petitioners do hereby certify that this motion for rehearing is presented in good faith and is not presented for the purpose of delay and that the petition is restricted to the matters therein contained.

By:_____
Elbert R. Jandt

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Petition for certiorari denied - same date

SUPREME COURT OF THE UNITED STATES

No. 199.—October Term, 1951.

Bruno A. Koehler and Hugo W. Ackermann, Petitioners, *v.* The United States of America.	On Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit.

[October 15, 1951.]

Memorandum by Mr. Justice Jackson, dissenting.

This case involves the power of federal officials to bring state officials to punishment under the remnants of Reconstruction Period legislation.

The state officer in this case, I may observe, richly deserves severe punishment. But the question in the case is one of federal against state power, a line which should not waver with the merits of individuals involved.

The statute, 18 U. S. C. § 242, is vague and general in the extreme. It makes criminal the willful "deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . ."

It is apparent from this case that this statute enables a federal administration to hold over all state officers a threat of prosecution whose vagueness is attested by the fact that this Court cannot decide most issues of deprivation of constitutional right without dissent, and often divides five to four.

The constitutionality of this very statute was recently sustained by a margin so narrow that no opinion could muster a Court majority. Even those who sustained it did so only by an interpretation of "willful" to require more than doing of the forbidden act, saying such "narrower" construction had support in the history of the act.

It was construed to require a specific intent to deprive one of constitutional rights in addition to the evil purpose in doing the act itself. The lower courts were reversed because the issue of specific intent to deprive of a constitutional right was not presented to the jury. *Screws* v. *United States*, 325 U. S. 91.

In this case the trial court properly charged the jury that it must find this specific intent. But it also instructed that "The color of the act determines the complexion of the intent. The intent to injure or defraud is presumed when the unlawful act, which results in loss or injury, is proved to have been knowingly committed. It is a well settled rule, which the law applies to both criminal and civil cases, that the intent is presumed and inferred from the result of the action."

This is wrong even by the test of the *Screws* decision. That opinion, referring to the specific intent, said, "And in determining whether that requisite bad purpose was present the jury would be entitled to consider all the attendant circumstances—the malice of petitioner, the weapons used in the assault, its character and duration, the provocation, if any, and the like." *Screws* v. *United States, supra*, at 107. In other words, while the *Screws* decision contemplated the decision of this issue on the whole evidence, the charge below presumed it from a single act. This is not a technical difference. Under the trial court's construction, the Government may merely prove the act and rest—the presumption does the work of evidence. Under the *Screws* case, no such presumption was authorized—the Government would have to produce evidence, circumstantial in most cases, to be sure, from which the jury could reasonably infer the specific intent. That, of course, made the way of the Government harder, but it was in this fact that the *Screws* opinion found assurance that the vague generalities of the statute could not become a menace to civil liberties or to

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state officials. This assurance of protection becomes a hoax if the requirement of specific intent is now to be wiped out with a presumption.

And this is no trivial matter. American criminal law heretofore has had little use for presumptions of criminality. It has required proof beyond a reasonable doubt of all matters that were elements of the crimes. Under the normal charge, which I think the *Screws* opinion contemplated, the jury would be instructed that they must, from all the evidence in the case, be satisfied beyond a reasonable doubt that the specific intent to deprive of a constitutiotnal right was present. Under the decision in this case, they can find a defendant guilty without even considering whether the evidence would show specific intent, for the presumption of law takes the place of the evidence. The burden of proof is on the defendant to overcome the presumption and establish his innocence of intent. If this is not a dangerous and novel importation into American criminal law, I do not recognize danger when I see it.

If this decision is allowed to stand, it is a rather earlier fulfillment of the fears of those of us who dissented in *Screws* than I had anticipated. The dissenting opinion of Judge Russell below seems to me the sound view of the law. I think our duty is to grant the writ.

In not joining this dissent, MR. JUSTICE FRANKFURTER wishes to refer to his views as to the meaning of a denial of certiorari. See *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U. S. 912.